Supreme Court, U.S.
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06-782 DEC 1 - 2006

In The
Supreme Court of the United States

OFFICE OF THE CLERK

IN RE DAVID L. GIBSON, et al.,

Petitioners,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, THE HONORABLE WILLIAM H. PRYOR AND ED CARNES, U.S. CIRCUIT JUDGES FOR THE ELEVENTH CIRCUIT AND THE HONORABLE M. CASEY RODGERS, U.S. DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

I. If filing Petitioner' suit in the transferee court would subject Petitioners' attorney to malpractice or sanctions under Fed. R. Civ. P. 11 ("Rule 11"), is the transferee district one "where [the case] might have been brought" under 28 U.S. C. §1404(a), the federal statute allowing for the transfer of civil actions,?

II. If all of Petitioners constitutional and statutory claims are viable in the transferor court's jurisdiction but some of those claims are barred by the transferee court's circuit law and law of the case:

(i) did Congress intend § 1404(a) to be a tool to give defendants a prejudicial advantage by allowing transfer of the case to a court where Petitioners' constitutional and statutory claims would be dismissed; and

(ii) is the transferee court one in which the action might have been brought?

III. If § 1404(a) authorizes transfer of Petitioners' Establishment and Due Process claims viable in the transferor court to a court where they are barred, does the transfer violate the First Amendment's Right to Petition for Redress?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rules 14.1(b) and 22.3(a), the following persons have an interest in the outcome of this Petition for Writ of Mandamus:

Richard L. Arnold, Petitioner and Plaintiff in the District Court;

Associated Gospel Churches ("AGC"), a Pennsylvania non-stock corporation that has no parent or subsidiary entities, Petitioner and Plaintiff in the District Court;

Ray A. Bailey, Petitioner and Plaintiff in the District Court;

Rick P. Bradley, Petitioner and Plaintiff in the District Court;

George P. Byrum, Petitioner and Plaintiff in the District Court;

Andrew Calhoun, Petitioner and Plaintiff in the District Court;

The Honorable Ed Carnes, Respondent, U.S. Circuit Court Judge, Eleventh Circuit;

Timothy J. Demy, Petitioner and Plaintiff in the District Court;

Patrick T. Doney, Petitioner and Plaintiff in the District Court;

Joseph E. Dufour, Petitioner and Plaintiff in the District Court;

Floyd C. Ellison, Petitioner and Plaintiff in the District Court;

Alan Garner, Petitioner and Plaintiff in the District Court;

David L. Gibson, Petitioner and Plaintiff in the District Court;

John Gordy, Petitioner and Plaintiff in the District Court;

William A. Hatch, Jr., Petitioner and Plaintiff in the District Court;

Gary Heinke, Petitioner and Plaintiff in the District Court;

Robert L. Hendricks, Petitioner and Plaintiff in the District Court;

Frank Johnson, Petitioner and Plaintiff in the District Court;

Laurence W. Jones, Petitioner and Plaintiff in the District Court;

Samuel David Kirk, Petitioner and Plaintiff in the District Court;

Frank S. Klapach, Petitioner and Plaintiff in the District Court;

Thomas G. Klappert, Petitioner and Plaintiff in the District Court;

Jan C. Kohlmann, Petitioner and Plaintiff in the District Court;

Allen L. Lancaster, Petitioner and Plaintiff in the District Court;

James Looby, Petitioner and Plaintiff in the District Court;

Manuel Mak, Petitioner and Plaintiff in the District Court;

Walker E. Marsh, Jr., Petitioner and Plaintiff in the District Court;

David Mitchell, Petitioner and Plaintiff in the District Court;

Jairo Marino, Petitioner and Plaintiff in the District Court;

Dan Nichols, Petitioner and Plaintiff in the District Court;
Edith Rene Porter-Stewart, Petitioner and Plaintiff in the District Court;

James V. Prince, Petitioner and Plaintiff in the District Court;

The Honorable William H. Pryor, Respondent, U.S. Circuit Judge, Eleventh Circuit;

The Honorable M. Casey Rodgers, Respondent, U.S. District Court Judge for the Northern District of Florida;

Javier Roman, Petitioner and Plaintiff in the District Court;

Lloyd Scott, Petitioner and Plaintiff in the District Court;

The Secretary of the Navy, in his official capacity, currently the Honorable Donald C. Winter, Respondent and Defendant in the District Court;

Gary Paul Stewart, Petitioner and Plaintiff in the District Court;

Fred A.Thompson, Jr., Petitioner and Plaintiff in the District Court;

Glenn Thyrion, Petitioner and Plaintiff in the District Court;
Armando Torralva, Petitioner and Plaintiff in the District Court;

Thomas Daniel Tostenson, Petitioner and Plaintiff in the District Court;

James Twamley, Petitioner and Plaintiff in the District Court;

The United States Navy, Respondent and Defendant in the District Court;

Thomas R. Watson, Petitioner and Plaintiff in the District Court;

Wilson W. Wineman, Petitioner and Plaintiff in the District Court; and

Chris Xenakis, Petitioner and Plaintiff in the District Court.

All of the above Petitioners and Plaintiffs in the District Court join in this Petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner Associated Gospel Churches ("AGC") is a fellowship of non-denominational Christian, evangelical churches which has endorsed chaplains to the military services since 1943. It is incorporated in Pennsylvania but has no stock that is publically traded. Its offices are located at 209 Pine Knoll Drive, Suite B, Greenville, South Carolina. AGC is a Department of Defense recognized endorsing agency. AGC, the only incorporated party in this cases, is not a publicly held corporation and no stock is publicly traded.

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CITATIONS OF ORDERS AND OPINIONS

The Eleventh Circuit's order denying Petitioners' petition for a Writ of Mandamus is unreported and set forth in the Appendix ("App.") at A-1. The opinion and order of the District Court for the Northern District of Florida ("NDFL") granting Defendants' motion to transfer the case to the District of Columbia under 28 U.S.C. § 1404(a) is unreported and set forth in the Appendix at A-2.

STATEMENT OF JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). The order granting the Defendants' motion to transfer this case to the District of Columbia was entered August 18, 2006. The Eleventh Circuit denied Petitioners' Mandamus Petition on September 14, 2006, without opinion. The Eleventh Circuit reviews § 1404(a) transfer motions through mandamus. *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 987-88 (11th Cir. 1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1404(a) provides in pertinent part:

> for the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district ... where it might have been brought.

The First Amendment to the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition

the government for a redress of grievances.

STATEMENT OF THE CASE

Petitioners are current and former Navy Christian non-liturgical chaplains (*See* Glossary, A-31) and a Christian non-liturgical chaplain endorsing agency suing on behalf of itself and as a representative of its Navy chaplains. Petitioners allege Respondents' former and present chaplain promotion systems, selective early retirement ("SER") system, and accession and personnel practices violate the Establishment, Free Speech, Free Exercise, and Due Process (Equal Protection Component) Clauses and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000-bb, by preferring Catholic and liturgical Protestant chaplains while prejudicing non-liturgical chaplains.

In June 2002, 23 of these 41 chaplain Petitioners moved to join *Adair v. England* (currently *Winter*), Case No. 00-cv-566 in the U.S. District Court for the District of Columbia ("D.C.") , in which other non-liturgical chaplain plaintiffs also challenge Navy promotion, separation, and accession policies under the First and Fifth Amendments and RFRA. The *Adair* district court denied the motion without prejudice or explanation on 7/16/03. Those 23 Petitioners joined with 18 other chaplains and filed their suit in the NDFL because Eleventh Circuit law allows them to bring claims barred by D.C. Circuit law and *Adair*'s law of the case.

After Petitioners filed suit, Respondents filed a 28 U.S.C. § 1404(a) motion to transfer the case to the District of Columbia with *Adair*. Petitioners opposed, arguing that it is not a case which could have been brought in the District of Columbia because Petitioners' major claims would be dismissed due to *Adair* or were untenable under *In re England*, 375 F.3d 1169 (D.C. Cir. 2004), *cert denied*, 543 U.S. 1152 (2005)

(discovery of unconstitutional conduct on promotion boards barred). Petitioners argued that they could individually bring their claims in districts or circuits where they each resided but could not, and would not, bring them in the District of Columbia and an attorney would commit malpractice if he did so. The NDFL granted Respondents' Motion. App A-8. Petitioners filed their mandamus petition in the Eleventh Circuit on September 1, 2006. The Eleventh Circuit denied the Petition, App A-1, September 14, 2006. The case was transferred to the District of Columbia and assigned to the *Adair* District Court Judge, the Hon. Ricardo Urbina. Respondents have noticed Judge Urbina they will move to consolidate this case with *Adair*.

REASONS FOR GRANTING THE WRIT

Petitioners seek reversal of the NDFL's transfer of their case to a district where no competent attorney would have filed. The D.C. Court's unique precedents would have resulted in dismissal of Petitioners' Establishment and Due Process Clause claims. The lower courts "decided an important federal question in a way that conflicts with the relevant decisions of this Court" by not intervening and reversing. *See* Supreme Court Rule 10. The resulting injustice denies Petitioners their right to petition for redress.

First, no case interpreting § 1404(a) has addressed the question whether the phrase "where [the case] might have been brought" is intended to address the ability of an attorney to bring the case without committing malpractice or violating Rule 11. Second, no § 1404(a) transfer case has decided whether it is in the interests of justice to transfer a case to another jurisdiction with unique and dramatically different precedents and case law that would subject the case's major claims to dismissal. Such a transfer contradicts this Court's ruling that a §1404(a) transfer motion should not be

equivalent to a motion to dismiss. This intersects with this Court's rule that a practice challenged under the Establishment Clause requires careful examination with a view to ascertain whether it furthers any of the evils against which that Clause protects.

Third, the challenged transfer allows the fiction of a "uniform federal law" to overrule the reality of vastly different circuit and case law between the transferor and transferee courts and permits "judicial economy" to trump vindication of Establishment Clause violations. Fourth, the transfer here effectively denies Petitioners fundamental rights, specifically denying (a) their right to petition for redress and (b) their right to address government violations of the Establishment and Due Process Clauses.

I. THE WRIT OF MANDAMUS PROVIDES THE ONLY MEANS FOR REMEDYING AN ILLEGAL § 1404(a) TRANSFER ORDER

After the NDFL granted Respondents' § 1404(a) motion, the Eleventh Circuit denied Petitioners' mandamus petition seeking to stop the transfer. Denial of mandamus does not fall into the "final judgment rule" because there has been no final judgment; mandamus is the only remedy available to prevent injustice and protect the Petitioners' constitutional claims. Failure to meet 28 U.S.C. § 1404(a) transfer criteria gives Petitioners a "clear and indisputable right" to issuance of the writ. *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE USE OF MANDAMUS

This case of first impression presents three questions of constitutional significance concerning the transfer statute,

28 U.S.C. § 1404(a). First, is this a case which could have been brought initially in the transferee court if bringing the case in that court would result in attorney malpractice or sanctions because the law applicable in the transferee court bars the Petitioners' claims? Second, does this Court's holding that § 1404(a) may not be used in a diversity case to produce the equivalent of a motion to dismiss also apply to federal cases where the law in the transferee court differs from the transferor court and requires dismissal of the major transferred claims? Third, is § 1404(a) unconstitutional as applied because transfer to the District of Columbia deprives Petitioners' of their right to petition for redress?

Key to understanding these questions are the differences in law between the District of Columbia Circuit and the Eleventh and other federal circuits. The differences are explained in detail in part B below and demonstrate the fiction of a "uniform federal law." The question is whether that fiction and "judicial efficiency" can trump Petitioners' constitutional rights and § 1404(a)'s words.

A. Standard of Review

This Court has often counseled that an appellate court has an obligation to make an independent examination of the whole record when First Amendment values are at stake. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-99 (1984). Courts must carefully examine a practice "challenged on establishment grounds with a view to ascertain whether it furthers any of the evils against which that Clause protects." *Comm. for Public Education v. Nyquist*, 413 U.S. 756, 772 (1972).

Courts review § 1404(a) transfer decisions for abuse of discretion. *SEC v. Smith*, 420 F.3d 1225, 1230 (11th Cir. 2005). Here, the Eleventh Circuit failed to examine this case's unique

circumstances against § 1404(a)'s criteria and ignored its responsibilities to examine whether Petitioners' Establishment and Due Process Clause claims could be raised and those violations vindicated.

B. Petitioners' Constitutional Claims Are Viable in Every Circuit Except the District of Columbia

Petitioners could not have brought their suit in the District of Columbia, the transferee court, because the *unique* law of the District of Columbia bars Petitioners' most important claims. Respondents' very purpose in transferring this case to the District of Columbia was to consolidate this case with *Adair* and bring this case under *Adair*'s unique law of the case, thereby obtaining a dismissal of Petitioners' constitutional claims. A chart showing "Viability of Claims by Circuit Venue" is at App A-26,-27. Petitioners have evidence supporting and validating each of their claims that can be developed and presented in the Eleventh Circuit but not in the District of Columbia Circuit. Transfer to the District of Columbia leads inevitably to the dismissal of all of Petitioners' claims below, depriving them of their right to petition and Establishment and Due Process Clause rights.

1. Granting discretionary civic power to denominational representatives violates the Establishment Clause

Chaplains are hired as denominational representatives. *See* Dept. of Defense Instruction 1304.28, Guidance for the Appointment of Chaplains, ¶¶ 6 and E2.1.9 (defining a chaplain as a "religious ministry professional" who is "endorsed to represent a Religious Organization and to conduct its religious observances or ceremonies"); *In re England*, 375 F.3d at 1171 (a chaplain is a denominational

representative). They sit on promotion boards composed of small numbers and vote in secret without accountability. Respondents have no effective guarantees "that the delegated power 'will be used exclusively for secular, neutral and non-ideological purposes,'" *Larkin v. Grendle's Den, Inc.*, 459 U.S. 118, 125-26 (1987) (quoting *Nyquist*, 413 U.S. at 780). Petitioners challenge 10 U.S.C. § 612's constitutionality[1] as applied to Navy Chaplain Corps boards (small boards with secret voting) under the First and Fifth Amendments. *Adair v. England*, 183 F.Supp.2d 31, 60-61 (D.D.C. 2002) rejects this claim.

2. Respondents' 26-year religious preference for Catholic chaplains on selection boards is unconstitutional

Petitioners challenge the Navy's 26-year policy reserving promotion board memberships for Catholic chaplains, and only Catholic chaplains. From fiscal year ("FY") 1977 to 1986 (10 years), the Navy reserved two chaplain board memberships on every promotion board for Catholic chaplains; from 1986 to FY02 (16 years), the Navy reserved at least one promotion board membership for Catholic chaplains. *See* Complaint ("Comp."), ¶¶ 51, 57-59 and its Exhibit 13 (list of FY77-02 Board members by name and denomination). Strict scrutiny should apply to this obvious 26-year denominational preference, *see County of Allegheny v. ACLU*, 492, 608-09 (1989), as it does in every district except the District of Columbia, where *Adair v. England*, 183 F.Supp.2d 31, 62 (D.D.C. 2002) (in a motion to dismiss), and *Adair v.*

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[1] 10 U.S.C. § 612 requires promotion boards to have at least five members, one of whom must be from the category under consideration. Until fiscal year 2003, a majority of chaplain promotion board members were chaplains. Larger boards and accountable voting as used by other services preclude board manipulation.

England, 417 F.Supp.2d 1, 6 (D.D.C. 2006), held chaplains act on promotion boards as naval officers, not denominational representatives.

3. Chaplains rating other chaplains is unconstitutional

Petitioners claim "the use of chaplains to rate other chaplains, except in unavoidable circumstances, violates the First and Fifth Amendments." Comp. at 113-16, Count 7, ¶¶ 95-104. Every circuit except the District of Columbia would apply the rule of *Larkin*, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (explaining three-part establishment test) or the reasonable observer standard to the practice, *see, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 656 (2002). Petitioners' evidence shows that some liturgical chaplains have a record of destroying non-liturgical chaplains who served under them, while favoring their own denomination's chaplains. Despite the evidence, the District of Columbia bars Petitioners' claim under *Adair's* case law. *See Adair*, 183 F.Supp.2d at 60-61 (dismissing claim).

4. Respondents illegally identified the promotion candidates' denominations to board members

Respondents provided promotion board members with the denomination or faith group of every chaplain candidate before the boards until FY02, *even though denomination is an illegal and impermissible criteria.* Petitioners allege this impermissible denominational criteria corrupted chaplain promotion and SER board proceedings, resulting in favoritism for liturgical denominations and bias and prejudice against Petitioners, *i.e.*, they were not selected for promotion or retention, while liturgical chaplains with inferior records were. This practice ceased after litigation began in *CFGC* and

Adair, an acknowledgment by Respondents that the practice was suspect. Comp. ¶¶ 55-56. Although *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 357 (1978), held government use of "suspect classifications is subject to strict scrutiny," *Adair*, 217 F.Supp.2d 7, 12-13 (D.D.C. 2002) held that plaintiffs must provide evidence the board members actually used the provided denominational information to prevail on this claim. This is impossible in the District of Columbia given *In re England*'s bar.

5. Denomination was an illegal chaplain promotion criteria

Petitioners allege and have evidence denominational considerations corrupted chaplain promotion and SER board proceedings, resulting in promotion or retention of liturgical chaplains with inferior records, while Petitioners were not promoted or retained. These First and Fifth Amendment claims depend on evidence that board members used denominational criteria in selections, *see Washington v. Davis*, 426 U.S. 229, 239-40 (1976), evidence that can only come from board members or witnesses to the board proceedings. Such evidence is available. *See* Stewart Declaration, App. A-24 (selection of an obese priest with a "grossly inferior" record); Kitchen Declaration and Ellison Affidavit at App. A-20 and A-22 (Protestant chaplain deselected to make room for a Catholic since no Catholic had been selected). At the time this case was filed, only the District of Columbia barred discovery of promotion board proceedings because of *In re England*. The Ninth and Eleventh Circuits would have allowed discovery of board proceedings. *See In re Nelson* 873 F.2d 1396, 1397 (11th Cir. 1989) (discovery allowed even though statute made agency files confidential; no statute provided the specific language necessary to exclude claims from civil discovery) and *Zambrano v. I.N.S.*, 972 F.2d 1122, 1125 (9th Cir. 1992) (citing *In re Nelson* as authority). The Ninth and Eleventh

Circuits would require specific language to bar judicial review of constitutional claims, following *Webster v. Doe*, 486 U.S. 592, 603 (1988). *In re England*, 375 F.3d at 1180 n.2 rejected *Webster*'s application to promotion boards, despite the *Adair* plaintiffs' evidence and constitutional claims.

6. RFRA violations

Petitioners allege that the Respondents' challenged policies also violate Petitioners' rights under RFRA, a viable claim in the Eleventh Circuit. In *Larsen v. U.S. Navy*, 346 F.Supp.2d 122, 137 (D.D.C. 2004), Judge Urbina ruled that RFRA only applies to policies or statutes of general applicability and does not apply if the purpose of the policy was discriminatory or prejudicial. This is contrary to the words of the statute, making § 2000bb-1(a)'s phrase "even if" a nullity. Respondents have stated they will move to consolidate this case with *Adair*.

7. The presumption of regularity

The presumption of regularity is a *rebuttable* presumption in other districts and circuits. However, in ruling on Respondents' 2002 motion to dismiss, *Adair* held that chaplains sit on promotion boards as naval officers, not as the denominational representatives they were hired to be, and the presumption of regularity applies to chaplain selection board personnel and their decisions, 183 F.Supp.2d 60-61, making the presumption *irrebuttable*.

C. Section 1404(a)'s Transfer Criteria Are Designed To Prevent Injustice

Section 1404(a)'s purpose is to alleviate the inequity *to defendants* when plaintiffs select a civil litigation venue that is unjust. *Hoffman v. Blaski*, 363 U.S. 335, 342 (1960). It provides

three criteria for the transfer of an action to another district: (1) "for the convenience of the parties and witnesses"; (2) "in the interest of justice"; and (3) the transferee court must be a district "where it might have been brought." At issue here are the second and third criteria, which this Court has defined in the context of diversity jurisdiction where the laws of the transferor and transferee district courts differ.

1. The interest of justice must protect a plaintiff's right to bring his claims

Blaski defined the meaning of "where [a case] might have been brought" by answering the question "whether a district court in which a civil action has been properly brought, is empowered by § 1404(a) to transfer the action ... to a district in which the plaintiff did not have a right to bring it." 363 U.S. at 336. *Blaski* addressed a diversity case's transfer at the defendants' request to a district where a similar case existed but where plaintiffs could not bring it. *Blaski* held that the plain words of the statute showed the transferee court was not a district "where it might have been brought" because the plaintiffs could not have brought their suit in that district and "the power of the district court under § 1404(a) to transfer an action to another district is made to depend not upon the wish ... of the defendant but rather upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." *Id.* at 343-44. The rule was simple: "if when a suit is commenced plaintiff has a right to sue in that district, ... it is a district where the action might have been brought. If he does not have that right, ... it is not a district where it 'might have been brought'...." *Id.* at 344.

Subsequent decisions confirm two important "in the interests of justice" principles underlying *Blaski*'s rule. First, the transfer must not hinder the ability and the right of plaintiffs to effectively bring claims because § 1404(a)

"required an alternative forum in which plaintiffs might proceed," *id.* at 342 (quoting *Gulf Oil v. Gilbert*, 330 U.S. 501,507 (1947)). *Van Dusen v. Barrack*, 376 U.S. 612 (1964), emphasized the plaintiff's right and ability to bring his claim by rejecting the argument that § 1404(a) could be used to deprive a plaintiff of favorable laws by a transfer to a district whose state laws prejudiced the plaintiffs. *Id.* at 638.

Van Dusen's defendants argued that the state law to be applied was irrelevant, *id.* at 618, while plaintiffs argued that "a § 1404(a) transfer might result in a prejudicial change in the applicable state law" contrary to the "interests of justice," *id.* at 625, because (a) "they were not qualified to bring" their case in Massachusetts and dismissal would result, *id.* at 619; and (b) Massachusetts law restricted remedial damages, *id.* at 626. This Court found that the district court "assumed that transfer to a more convenient forum may be granted on a defendant's motion even though that transfer would seriously prejudice the plaintiff's legal claim." *Id.* at 627. *Van Dusen* rejected this approach: "In such cases a defendant's motion to transfer could be tantamount to a motion to dismiss," *id.* at 630.

To preserve the plaintiff's "ability to pursue" his claims under favorable law, *see id.* at 636, this Court held the substantive law applied to the claims was the transferor court's law, *i.e.*, where the case was brought. *Id.* at 639. This protected plaintiff's right to petition for redress. *See also Goldlawr v. Heiman*, 369 U.S. 463, 466 (1962) (commenting on Congress' intent to remove "whatever obstacles may impede an expeditious ... adjudication of cases and controversies on their merits.") "[I]f the applicable law were to change after transfer, the plaintiff's venue privilege and resulting state law advantage could be defeated at the defendant's option." *Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990) (citing *Van Dusen*, 376 U.S. at 638).

Second, § 1404(a) "allowed plaintiffs to retain whatever advantage may flow from the state laws of the forum they have initially selected. There is nothing ... in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantage accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue." *Van Dusen*, 376 U.S. at 633-34. The interest of justice meant insuring that "the accident of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in a federal court which could not have been achieved in the court of the State where the action was filed." *Id.* at 638. *Van Dusen* concluded, "where the defendants seek transfer, the transferee court must be obligated to apply the state law that would have applied if there had been no change of venue." *Id.* at 639. The underlying rule is that a plaintiff should not be disadvantaged by a § 1404(a) transfer.

> [Section] 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history ... certainly does not justify the rather startling conclusion that one might 'get a change of a law as a bonus for a change of venue.'

Ferens, 494 U.S. at 522 (citing *Van Dusen*, 376 U.S. at 635)(internal citations omitted).

2. <u>The concept of a "uniform federal law" is a *rebuttable* fiction</u>

Ferens held that "[t]he *Van Dusen* policy against forum

shopping simply requires us to interpret § 1404(a) in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue." *Id.* at 527. However, when a case involving a federal question is transferred from one jurisdiction to another, federal courts have applied the fiction of uniform federal law with the transferee court applying its own circuit's precedent. *In re Korean Air Lines*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987), *aff'd on other grounds sub nom, Chan v. Korea Air Lines*, 490 U.S. 122 (1989), explained that *Van Dusen* reflects the need to ensure uniformity in the application of state law regardless of location of the court but did not apply to federal questions because "it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of *what is supposed to be* a unitary federal law." *Id.* at 1175-76 (emphasis added). *See Murphy v. F.D.I.C.*, 208 F.3d 959, 964-65 (11th Cir. 2000) (discussing *In re Korean Air Lines* and Second, Eighth, and Ninth Circuit decisions agreeing with the D.C. Circuit).

None of those cases addressed this situation where a transfer from one federal district court to another would be the equivalent of a motion to dismiss (because of differences in the district's law) and the defendants "get a change of a law as a bonus for a change of venue." None of those cases address the question here whether the transferee court was one in which the suit could have been brought if filing the case would subject the attorney to malpractice or Rule 11 sanctions. The fiction of uniform federal law, useful in other contexts, should not become an irrebuttable presumption closing the courts' eyes to obvious injustice particularly when this Court has found irebuttable presumptions raise serious legal and constitutional questions. *See, e.g., Vandis v. Kline*, 412 U.S. 441, 446 (1973) ("permanent irrebuttable presumptions have long been disfavored").

D. The District of Columbia Is Not a District Where the Case Might Have Been Brought Since an Attorney Filing the Case There Would Commit Malpractice and Violate Rule 11

The ability to "bring a case" is dependant upon, not independent of, the rules governing the attorney who must investigate the facts and the law, draft and file the pleadings, and argue the legal theories, precedents, and facts before the tribunal. District of Columbia law raises serious impediments to vindicating Petitioners' claims. If a competent attorney could not bring suit in the District of Columbia fearing malpractice or violation of Rule 11, it is not a district in which the case might have been brought. The lower courts did not examine the differences between Eleventh Circuit law and the District of Columbia's law of the case and Circuit law, or their impact on an attorney's ability to file this case in the District of Columbia. Both lower courts failed to evaluate the impact on the public interest and the "interest of justice" in vindicating constitutional claims, *e.g.*, exposing Establishment Clause violations, or damage to the Constitution when plaintiffs are precluded from arguing Establishment Clause claims. Implicit but not addressed in *Blaski* and *Van Dusen* is the legal reality that those attorneys could not bring suit in the transferee courts because they would have committed malpractice to do so.

1. <u>The District of Columbia's attorney's standard of care and this case</u>

The District of Columbia's Rules of Professional Conduct ("Prof. Rules") show that no competent attorney would bring Petitioners' case there. Doing so would risk malpractice because many of their major claims are barred by *Adair*'s law of the case or the law of the Circuit.

Prof. Rule 1.1 requires an attorney to analyze the district/circuit law applicable to his clients' claims; Prof. Rule 2.1 requires he inform his clients of both valid and invalid claims, including those which could not be brought due to local and controlling precedent. *See Simpson v. Chesapeake & Potomac Tel. Co.*, 522 A.2d 880, 883-85 (D.C. App. 1987) (discussing attorney's duty and failure to investigate claim). The Prof. Rules also require the attorney to inform clients of their chances of success, and defendants' possible defenses. Prof. Rules 1.1, 1.3, 2.1.

Prof. Rules 1.1 and 2.1, require an attorney to inform his clients that if he were to bring these Petitioners' claims in D.C., the case would be assigned as a "related case" to *Adair*'s judge *and fatal consequences would follow.* With *Adair* and *In re England's* precedents, Petitioners cannot prevail in the District of Columbia on their claims that: (1) 10 U.S.C. § 612 was unconstitutionally applied; (2) having chaplains on boards raised First Amendment issues because denominational bias infected the boards; (3) the 26-year denominational preference reserving a selection board membership for at least one Catholic violated the Establishment Clause; (4) chaplains rating other chaplains violated the First and Fifth Amendments and RFRA; and (5) the challenged practices and preferences violated RFRA. *See Adair*, 417 F.Supp.2d at 6; *Adair*, 183 F.Supp.2d at 60-61.

Petitioners' counsel advised them against filing in the District of Columbia because major elements of their case would be dead on arrival and "resurrection" years away only after a lengthy appeal process because of the *Adair* Court's: (a) dismissal of claims that chaplains on selection boards raised First Amendment issues; (b) holding the presumption of regularity trumped strict scrutiny, (c) failure to apply strict scrutiny to obvious denominational preferences, *see Adair*, 417 F.Supp.2d at 6-8; *Adair*, 183 F.Supp.2d at 60-62; and (d) the

difficulty the law of the case creates for vindication of their rights. Petitioners' counsel also informed them *In re England's* bar of discovery of promotion board proceedings precludes success in the District of Columbia on their establishment claims of (a) denominational bias on promotion boards and (b) Fifth Amendment violations from Respondents' abandoned practice of identifying each board candidate's faith group to the board members. Arthur A. Schulcz Declaration (Petitioners' counsel) at ¶¶ 13-14, 16, App A-15-16. *See* Prof. Rules 2.1 and 3.2. No rational clients informed of the facts and faced with this choice would ask to or bring their suit in the District of Columbia; none did so here. Rather than recognize the absurdity of bringing an action where it would be dismissed because of the local precedent, the NDFL considered this act of reason impermissible forum shopping. A- 8 n.3.

Prof. Rule 3.1 provides that "[a] lawyer shall not bring ... a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous ...." Filing a claim similar to one that has already been dismissed is a "frivolous claim."

2. Bringing claims in a district subject to dismissal but viable elsewhere is malpractice

A successful legal malpractice claim in the District of Columbia requires that a plaintiff prove (1) an attorney-client relationship with the attorney; (2) the existence of a duty on the part of the attorney; (3) the attorney's breach of that duty; and (4) the attorney's failure to perform the duty was the proximate result of damages to plaintiff. *Smith v. Haden*, 872 F.Supp. 1040, 1044 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir.

1995). Minimal research would disclose that there are only two cases involving chaplains currently in federal district courts, both in the District of Columbia, and claims barred there are viable in other jurisdictions.

An attorney would breach his or her duty to the client and harm the client by bringing suit in a district where he knew (a) the major elements of his client's case would be dismissed on a motion to dismiss, (b) the court would not apply strict scrutiny on the major issues because of the existing case law, and (c) discovery was barred. This is malpractice under Prof. Rule 8.4 and/or a violation of Rule 11, subjecting the attorney to damages. *See Breezevale LTD. v. Dickenson*, 759 A.2d 627, 634 (D.C. 2000) (attorney malpractice crippled client's ability to get to trial). This is a legal reality in many jurisdictions. *See, e.g., Sun Valley v. Roseholt, Robertson & Tucker,* 981 P.2d 236, 240 (Idaho 1999) (attorney must undertake "reasonable research of the relevant legal principles," exercise due care in "investigating the merits of his opponent's position," and must be familiar with "controlling points of law").

3. Bringing Petitioners' claims in the District of Columbia violates Rule 11

Rule 11 mandates that an attorney "make reasonable inquiry" before signing pleadings and authorizes sanctions "to emphasize the obligations of attorneys to exercise due care in the preparation and filing of pleadings." *Rowland v. Fayed*, 115 F.R.D. 605, 607 (D.D.C. 1987). Rule 11 "specifies that [the attorney's signature] constitutes a certificate that the attorney has ... performed a 'reasonable inquiry' to insure [the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for a change in the law." *Id.* at 608. Claims raised contrary to precedent or existing law are not "warranted by existing law." *Id.* Research shows

Petitioners' major claims are viable everywhere except in the District of Columbia. The unique feature of that Circuit's law and *Adair*'s law of the case makes filing Petitioners' claims there a violation of Rule 11.

If an attorney risks malpractice or Rule 11 violations by bringing a case in the transferee court, it cannot be a jurisdiction in which the case "could have been brought."

E. Transfer From a District Where Petitioners' Claims are Viable to a District Where They May Be Dismissed Is Contrary to the Interests of Justice

The question before the Court is: "What does 'Interests of Justice' mean in the context of Petitioners' claims of pervasive Establishment and Due Process (equal protection component) Clause violations?" The lower court's decision would have it mean "that transfer to a more convenient forum may be granted on a defendant's motion, even though that transfer would seriously prejudice the plaintiff's legal claim," a concept specifically rejected by *Van Dusen*, 376 U.S. at 627. Under this reasoning, Petitioners, by filing a case in a court in which venue and subject matter jurisdiction are proper, lose their First Amendment rights to call Respondents to account for their unconstitutional practices because Respondents are fortunate to have a pending case in another venue that denies those rights. In essence, the lower courts have said: (1) neither Petitioners' choice of forum, law or rights matter; (2) avoiding duplicative litigation is a higher constitutional value than vindicating constitutional rights and forcing the government to obey the Constitution; and (3) by filing *as a group* in a federal court, Petitioners waive their right to litigate their claims in a venue where their claims are viable.

First, Petitioners' claims barred in the District of

Columbia involve the Establishment Clause. This Court "require[s] [a] careful examination of any [practice] challenged on establishment grounds with a view to ascertain whether it furthers any of the evils against which that Clause protects." *Nyquist*, 413 U.S. at 772; *County of Allegheny*, 492 U.S. at 609. This should include making sure such claims are not thwarted because of one circuit's unique law. The lower courts' analysis completely ignored the fatal effect of their decisions on Petitioners' Establishment Clause claims in the transferee court, allowing Respondents to effectively subvert the Constitution.

Second, transfer of this case to the District of Columbia effectively converts a statute whose purpose is to ensure justice into one that perpetrates injustice. This is incompatible with *Van Dusen* holding that the words of the statute, its purpose, and "the interests of justice" do not allow a change of venue to (a) provide a defendant a change of law as a bonus, 376 U.S. at 636, or (b) result in dismissing a plaintiff's claims because of the transferee court's law, *id.* at 636-38. "Justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S.133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

1. The same "interest of justice" should apply to diversity and federal question cases

Section 1404(a) contains no distinction between diversity and federal question cases. *Van Dusen* and *Blaski* were diversity cases, but the same interpretation must apply to the statute's words and purpose absent some hint Congress wanted different rules to apply to federal cases. *Blaski* rejected an argument that defendants could transfer an action to any venue they wished, regardless of whether the action could have been brought there initially. "The thesis urged by

petitioners not only would do violence to the plain words of § 1404(a), but would also inject *gross discrimination*." 363 U.S. at 344 (emphasis added). *Van Dusen* also held that nothing in the language or policy of § 1404(a) justifies "its use by defendants to defeat the advantage accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue." 376 U.S. at 633-34. Clearly, those principles are violated in this case; it is as if this Court had never addressed the issue. Here, § 1404(a) is a tool of oppression in the hands of defendants allowing a transfer of a case to a place where no sane chaplain plaintiff would bring it because the law would require dismissal of his major Establishment and Equal Protection Clause claims. Respondents have not pointed to any case showing the statute enables a defendant in a federal question action to achieve a prejudicial advantage on constitutional questions over a plaintiff, a result forbidden in a diversity case. The "interests of justice" standard for federal question actions must be the same as diversity actions. If the "accident" of federal diversity jurisdiction "does not enable" a defendant to obtain a prejudicial advantage by a § 1404(a) transfer, the accident of "federal question" jurisdiction certainly does not allow that advantage.

In *Van Dusen*, the Court found that the substantial difference in state laws would "result in a prejudicial change in the applicable [] law" contrary to the "interests of justice." 376 U.S. at 625. That is the situation here. The fiction of "uniform federal law" may be true when there are minor differences between circuit laws, but it is not true here where there are substantial differences and the application of the transferee court's law produces the very prejudice that *Blaski* and *Van Dusen* forbid. Here the lower courts closed their eyes to obvious injustices, essentially transforming this fiction into an irrebuttable presumption that results in the denial of Petitioner's Establishment and Due Process Clause claims. *See*

Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right" although generally valid).

2. A transfer to the District of Columbia is unjust because its unique laws prejudice Petitioners' claims

Review of this case and the implications flowing from its transfer show the injustice which Petitioners, the public interest and the Constitution would suffer from transfer. On 6/1/06, Petitioners sought declaratory judgment on the constitutionality of Respondents' 26-year denominational preference of reserving at least one chaplain promotion board membership for Catholic chaplains, which the NDFL dismissed without prejudice until Respondents appeared. That motion is similar to the one *Adair*, 417 F.Supp.2d at 6, rejected. Comparison of the difference in laws shows the obvious injustice.

In the Eleventh Circuit, courts would apply strict scrutiny to the practice. "*Larson* [*v. Valente*, 456 U.S. 228, 245 (1982)] teaches that, when it is claimed that denominational preference exists, the initial inquiry is whether the [practice] facially differentiates among religions. If such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). Exhibit 13 to Petitioners' Complaint lists board members and denominations from FY1977 to 2002 and demonstrates a clear denominational preference. *County of Allegheny*, 492 U.S. at 608-09 and *Larson* require strict scrutiny.

Eleventh Circuit precedent would apply *Hernandez's* strict scrutiny test. In *Church of Scientology Flag Service Org.*,

Inc. v. City of Clearwater, 2 F.3d 1514 (11th Cir. 993), *cert denied*, 513 U.S. 807 (1994), the court cited its rule that an improper religious motive invalidates official action challenged under the Establishment Clause, *id.* at 1529 (citing *American Civil Liberties Union v. Rabu County Chamber of Commerce*, 698 F.2d 1098, 1110-11 (11th Cir. 1983)). Respondents' action, despite a 1986 federal court's warning that their practice of reserving two promotion board seats for Catholics violated the Establishment Clause, is evidence of Respondents' motive and intent to benefit a single denomination.

On the other hand, *Adair* held that those plaintiffs had no chance of succeeding on the merits of their declaratory judgment motion attacking Respondents' 26-year preference in composing selection boards. 417 F.Supp.2d at 6. *Adair*'s denial was based on the law of the case: chaplains served on promotion boards as naval officers, not denominational representatives, and the presumption of regularity applied to chaplain promotion boards. *Id.*

Petitioners also allege that some promotion decisions were based on denominational considerations, a practice the Constitution forbids. Absent a clearly defined compelling purpose, the Establishment and Due Process Clauses absolutely prohibit denomination as a criteria for the award or denial of government benefits such as promotions or retention. Denial of promotion for religious reasons is a double injury because an officer who fails in selection to the next higher grade below the rank of commander is subject to separation under 10 U.S.C. § 632. Respondents' selection board procedures impose a veil of secrecy over the selection process. Petitioners' evidence shows or suggests that this secrecy and lack of accountability in voting have encouraged denominational bias by chaplain board members in chaplain promotion and SER decisions. Three examples illustrate the issue.

Petitioner Gary Stewart, recorder on the FY92 LCDR promotion board, reviewed all the candidates' records, giving him personal knowledge of the strength and quality of the promotion candidates' records. That board selected an obese Catholic whose record was "grossly inferior" to the records of some chaplains who were not selected for promotion. Stewart Declaration at ¶ 4-5, App. A-24. Obesity in the military is a serious impediment to promotion. LCDR Stewart is willing to testify whether denomination played a role in that obese Catholic chaplain's selection.

The Declaration of Klon K. Kitchen, ¶¶ 5-6, and Affidavit of CAPT Floyd C. Ellison, ¶¶ 5-6, App. A-20 and A-22, describe two different board members' accounts of the same misconduct that occurred on the FY97 Chaplain Captain promotion board. The two board members reported to others that the Catholic board member complained that no Catholic had been selected. The board reconvened, deselected a Protestant, and selected the Catholic recommended by the Catholic board member. *Id.* If true, this is a blatant affront to the Constitution that won't be addressed in the District of Columbia where board proceedings are absolutely protected from discovery.

Petitioners' Complaint, ¶ 65a, cites the Naval Inspector General (NIG) and the Department Of Defense Inspector General (DOD IG) investigations of misconduct and denominational bias by the FY97-98 Chaplain Commander promotion boards. The DOD IG, at 3-4 and 34, concluded that denominational bias "may" have influenced selections in both years. The FY97 board president, RADM Holderby, (1) admitted to the NIG that a Catholic with an inferior record was selected over a Protestant with a perfect record, NIG 2/19/ 98 Interview; (2) explained to the DOD IG that the board applied denominational considerations, DOD IG at 24; and (3) admitted that the Chaplain Corps gave Catholic priests

special treatment. *Id.*

In the Eleventh Circuit, Petitioners may pursue testimony from board personnel to establish that denominational bias permeated the selection process in these specific and other instances. The fact that these specific instances occurred means nothing in the District of Columbia because *In re England* bars Petitioners from pursuing their claims concerning selection board misconduct.

Is there anything in § 1404(a)'s legislative history or this Court's precedent to indicate that § 1404(a) was meant to become a tool for the repression and suppression of valid Establishment Clause claims? *Blaski* and *Van Dusen* say "No." "The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that [Respondents are entitled to] 'get a change of law as a bonus for a change of venue.'" *Ferens*, 494 U.S. at 523. Section 1404(a) should be interpreted "in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue." *Id.* at 527. The "interests of justice" should include whether such claims will be dismissed due to the transferee court's unique local law. The lower courts did not consider this.

3. This case's special circumstances make transfer unjust

Twenty-three of these Petitioners moved to join *Adair* in June 2002. Respondents opposed, and *Adair* denied their motion in August 2003. Respondents now argue that Petitioners must be sent to the very court that rejected their earlier request, a court where they cannot bring all their claims and which has rejected the application of strict scrutiny to a blatant 26-year denominational preference. This does not further the appearance of justice.

F. In the Alternative, § 1404(a) Violates Petitioners' Right to Seek Redress if § 1404(a) Authorizes Transfer to a Court Where Petitioners' Viable Establishment and Due Process Claims Are Barred

Transfer of Petitioners' case to a district in which its constitutional claims are barred violates Petitioners' First Amendment right to petition to seek redress. As shown in B above, Petitioners' constitutional claims are viable in any district except the District of Columbia. "The right of access to the courts is but one aspect of the right to petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Implicit in many of this Court's holdings on availability of evidence is the presumption that a party seeking redress for Bill of Rights violations must have access to the information necessary to establish those claims. *E.g.*, *United States v. Bryan*, 339 U.S. 323, 331 (1950) ("the public ... has a right to every man's evidence"); *Trammel v. United States*, 445 U. S. 40, 50-51 (1980).

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Virginia State Bd of Ed. v. Barnett*, 319 U.S. 624, 638 (1943). Transfer places Petitioners on a different legal footing than all other citizens in the country. Here, Navy chaplains with evidence that denominational considerations influence promotion board selections are unable to challenge that process in the District of Columbia, the transferee court. Although any Petitioner could have challenged these procedures within his local jurisdiction, *e.g.*, the Ninth Circuit, they are precluded from doing so here because they sought to take advantage of combining their similar causes of action and brought them in a forum, *i.e.*, the Eleventh Circuit, whose laws

allowed them to address these serious violations of the Constitution.

A "statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right" although generally valid. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). That principle should be applied here.

Although not a right to petition case, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), held that funding restrictions forbidding challenges to the constitutionality of welfare laws and policies violated the Constitution. Congress' efforts "to insulate current welfare laws from constitutional scrutiny" and "the Government's interpretation of the Constitution from judicial challenge" were unconstitutional. *Id.* at 547. A § 1404(a) transfer here produces the same result: a change in district courts gives Respondents a litigation windfall by insulating their practices from judicial review while disenfranchising Petitioners from the Constitution's protections.

III. NO OTHER COURT CAN PROVIDE ADEQUATE RELIEF

Since a transfer motion is not a final judgment, there is no other means by which review may be sought. Mandamus is traditionally used to confine or direct a court to its jurisdiction or discharge of a duty. Mandamus is appropriate to address the lower courts' abuse of discretion in failing to properly apply § 1404(a)'s criteria and to enforce the statute's purpose of ensuring that transfers are only in the interest of justice, not injustice. Additionally, there is no other way to protect or vindicate Petitioners' claims that will be prejudiced by the unique nature of District of Columbia law.

CONCLUSION

The NDFL improperly ordered this action transferred to the District of Columbia where Petitioners would not bring their claims contrary to § 1404(a)'s criteria. The Eleventh Circuit also failed to properly evaluate the NDFL's transfer order under § 1404(a)'s criteria. The Petitioners respectfully request that this Court issue a writ of mandamus to review and vacate that transfer order.

Respectfully submitted,

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Counsel for Petitioners

No. _____

In The Supreme Court of the United States

IN RE DAVID L. GIBSON, et al.,

Petitioners,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, THE HONORABLE WILLIAM H. PRYOR AND ED CARNES, U.S. CIRCUIT JUDGES FOR THE ELEVENTH CIRCUIT AND THE HONORABLE M. CASEY RODGERS, U.S. DISTRICT COURT JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA

APPENDIX

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APPENDIX TO THE PETITION FOR WRIT OF MANDAMUS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14719-I

IN RE:
DAVID GIBSON, ET AL.,

Petitioners.

FILED
U.S COURT OF APPEAL
ELEVENTH CIRCUIT

SEP 14 2006
THOMAS K KAHN
CLERK

On Petition for Writ of Mandamus to the Appeal from the United States
District Court for the Northern District of Florida

BEFORE: CARNES and PRYOR, Circuit Judges.

BY THE COURT:

The petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DAVID L. GIBSON, et al.,

Plaintiffs,

v. Case No. 3:06cv187/MCR

UNITED STATES NAVY, et al.,

Defendants.
_____/

ORDER

This cause is before the court on the "Renewed Motion to Transfer to the District Court for the District of Columbia Pursuant to 28 U.S.C. § 1404" filed by defendants. (Doc. 16, memorandum at doc. 17). Plaintiffs filed a responsive memorandum in opposition (doc.19), to which defendants have replied with leave of court (doc.23). For the reasons stated below the court GRANTS defendants' motion to transfer.

Background

In their complaint plaintiffs in part describe this case as "a federal class action [brought] by non-liturgical Christian Navy chaplains challenging religious discrimination and violations of the First and Fifth Amendment and the Religious Freedom Restoration Act ("RFRA") in the U.S. Navy Chaplains Corps (the "CHC") promotion, accession, assignment, retention and separation systems and decision making processes"; they also assert "an as applied constitutional challenge to 10 U.S.C. § 612." (Doc. 1, ¶¶ 1, 2).

The complaint names forty-one individual plaintiffs and one organizational plaintiff; defendants are the United States Navy and the Secretary of the Navy. Jurisdiction is alleged to be conferred by 28 U.S.C. §§ 1331, 1343, and 1346; 5 U.S.C. § 702; and 42 U.S.C. § 2000-bb. The one hundred forty-two page complaint contains fifteen counts, including claims of federal constitutional and statutory violations, fraudulent concealment of evidence, illegal retaliation and cover-up, and construction discharge. As redress, plaintiffs seek extensive declaratory and injunctive relief, as well as attorneys' fees, costs, and expenses.

In their motion to transfer defendants point to two consolidated cases which are pending in the United States District Court for the District of Columbia ("D.C. district court"), Chaplaincy of Full Gospel Churches v. Johnson, Case No. 99-2945, and Adair v. Danzig, Case No. 00-566 ("CFGC/Adiar cases").[2] Defendants contend that the claims in these two cases, which are before the Honorable Ricardo Urbina and have been litigated for approximately five years, are nearly identical to those brought the instant case. According to defendants, plaintiffs in the CFGC/Adiar cases "recently suffered several tactical defeats," following which they sought Judge Urbina's reassignment from the cases. The D.C. Circuit denied this request on April 20, 2006; just eight days later, on April 28, 2006, plaintiffs filed this action. The next week, on May 5, 2006, plaintiffs moved for and obtained decertification of the class in Adair, the case in which Judge Urbina had granted the plaintiffs' motion to certify a class but in which a class had not yet been defined. Defendants argue

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[2] Defendants state that the cases have been consolidated for purposes of preliminary motions, case management, and discovery. A complete discussion of the extensive and complicated procedural history of these cases, including appellate history, may be found in defendants' motion.

that in light of this history plaintiffs' action of filing the instant case in this district amounts to a "transparent exercise in forum shopping." In the interest of justice, including enforcing the prohibition against duplicative litigation and promoting judicial economy, defendants submit that the instant matter should be transferred to the D.C. district court for futher proceedings pursuant to 28 U.S.C. § 1404(a).

In opposition, plaintiffs argue that defendants' motion is "misleading, omits critical information and fails to meet 28 U.S.C. 1404(a)'s transfer criteria" and in fact is "an attempt to subvert the purposes of justice...." (Doc. 19 at 7). Plaintiffs complain that, contrary to defendants' representations, they are not part of any other chaplain litigation; that the D.C. district court has rejected their efforts to join the CFGC/Adiar cases; that the D.C. district court has "denied subject matter jurisdiction" over their constitutional claims (which, in any event, are not "nearly identical" to the claims in the instant case); and that defendants have not informed this court of the significant differences between the law of the Eleventh Circuit and that of the District of Columbia (particularly regarding discovery, the review of denominational preference claims under a strict scrutiny standard, and the strict observance of Supreme Court precedent which holds that violations of the First Amendment even for brief periods constitutes irreparable injury) or that the application of the former would severely prejudice plaintiffs' case. According to plaintiffs, they do not have a right to bring all of their claims in the District of Columbia because Judge Urbina has already dismissed similar claims in the litigation before him, and the law of the District of Columbia bars certain other claims. In addition, transfer would not be in the interest of justice because, due to differences in the substantive law between the Eleventh Circuit and the District of Columbia Circuit, plaintiffs would be unable to obtain a decision on the merits of their case in the District of Columbia. Inter alia, plaintiffs also submit that

retention of the instant case in a district which will hear its claims rather than transfer it to a district which will not serves the interest of justice, that they have properly sought judicial relief in this court, and that defendants' argument that the filing of multiple civil actions constitutes harassment and an "'uninvited intrusion into the military affairs'" is specious.

Defendants reply that plaintiffs have failed to counter the argument that, where two courts are presented with virtually the same claims between the same parties, the interest of justice is furthered by having only the court initially seized of the controversy decide the case. They also argue that both this case and Adair are pled as putative class actions and thus, if certification is granted in either case, the plaintiffs in both actions would be members of the class; moreover, the putative class is represented by the same counsel and is advancing claims which are nearly the same. Defendants also submit that because venue and subject matter jurisdiction are proper in the D.C. district court plaintiffs' action could have been brought there; that there may differences in substantive law between the transferee and transferor courts is irrelevant to the § 1404(a) analysis. Further, according to defendants, plaintiffs are incorrect in stating that the CFGC/Adiar court "denied subject matter jurisdiction" over their constitutional claims; rather, the dismissal was for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6). Additionally, defendants contend that plaintiffs' choice of forum need not be given great weight because few of the forty-one individual plaintiffs in this case reside in this judicial circuit and few of the crucial operative events occurred here; also, on appeal the D.C. Circuit did not hold that plaintiffs' claims are precluded but rather that certain information was privileged and not subject to discovery. Finally, defendants note that plaintiffs' stated reasons for seeking to proceed in this district, i.e., certain differences in the substantive law which may favor their claims and the perception that the district court's rulings

possibly evince prejudice or hostility towards them, constitutes impermissible forum shopping.

Discussion

Pursuant to § 1404(a), for the convenience of the parties and witnesses, in the interest of justice the district court may transfer a civil action to any other district where the action might have been brought. 28 U.S.C. § 1404(a); see generally Van Dusen v. Barrack, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (holding that the purpose of Section 1404(a) is "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense") (citations omitted); Brown v. Conn. Gen. Life Ins. Co., 934 F.2d 1193, 1197 (11th Cir. 1991). In addressing these factors the court should consider such matters as the plaintiff's initial choice of forum, convenience of the parties and witnesses, relative ease of access to sources of proof, location of relative documents, the public interest, and any other practical problems that make trial of the case easy, expeditious, and inexpensive. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947); see also Miot v. Kechijian, 830 F.Supp. 1460, 1465-66 (S.D.Fla. 1993); Meterlogic, Inc. v. Copier Solutions, Inc., 185 F.Supp.2d 1292, 1300 (S.D.Fla.2002). The moving party bears the burden of establishing that the balance of § 1404(a) interests favors the transfer. The decision to transfer an action pursuant to § 1404(a) is left to the "sound discretion of the district court and [is] reviewable only for an abuse of that discretion." Roofing & Sheeting Metal Services v. La Quinta Motor Inns, 689 F.2d 982, 985 (11th Cir. 1982).

This court first considers whether the instant action might have been brought in the District of Columbia. If a plaintiff would have had a right to bring suit in the proposed transferee district at the commencement of the action, "independently of the wishes of [the] defendant," then the

transferee district is a district where the action "might have been brought." Hoffman v. Blaski, 363 U.S. 335, 344, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960). Accordingly, to prevail on a motion to transfer venue under § 1404(a), the moving party must demonstrate that venue, personal jurisdiction, and subject matter jurisdiction would all have been proper in the proposed transferee district. Id. at 343-44. In this case, there appears to be no question that venue is proper in the D.C. district court and that principles regarding personal jurisdiction have no applicability with respect to these federal defendants. As to the issue whether subject matter jurisdiction would lie in the proposed transferee district, upon review of plaintiffs' claims it is readily apparent to this court that it would.

The court next considers whether the proposed transfer would be for the convenience of the parties and witnesses and would be in the interest of justice. Essentially for the reasons offered by defendants in their motion and reply, the court concludes that transfer to the D.C. district court would further both aims. It is true that a plaintiff's choice of forum should not be disturbed unless its choice is clearly outweighed by other considerations. Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Circ. 1996). As here, however, a plaintiff's choice of forum may properly be accorded less weight where the forum lacks any significant connection with the underlying claim or operative facts. A.J. Taft Coal Co., Inc. v. Barnhart, 291 F.Supp.2d 1290, 1310 (N.D.Ala. 2003). It also appears that it would be, at the very least, equally convenient for witnesses, defendants, and plaintiffs - the majority of whom are scattered around the United States and only one of whom appears to reside in the nOrthern District of Florida - to litigate this case in the Washington, D.C., area as opposed to the Pensacola, Florida, area. With respect to access to sources of proof and the location of documents, it should also be equally - if not more - convenient for the parties to litigate

in that forum rather than the instant one. The court also concludes that the public interest favors transferring the case to the D.C. district court. Although "[t]here is a local interest in having localized controversies decided at home," Gulf Oil Corp., 330 U.S. at 509, this case has virtually no local connection. Finally, and perhaps most importantly, the court finds that the dual interests of judicial efficiency and economy would be advanced through transfer to the D.C. district court.[3]

As set forth above, the court concludes that this action might have been brought in the D.C. district court and that defendants have met their burden of showing that the balance of § 1404(a) interests favors transfer to that forum. Accordingly, for the convenience of the parties and witnesses, in the interest of justice, this case shall be transferred to the United States District Court for the District of Columbia, pursuant to 28 U.S.C. § 1404(a).

Accordingly, it is ORDERED:

1. Defendants' "Renewed Motion to Transfer to the District Court for the District of Columbia Pursuant to 28 U.S.C. § 1404(a)" (doc. 16) is GRANTED.

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[3] The court rejects plaintiffs' argument that transfer would be contrary to the interest of justice because prejudice would accrue to them from the application of D.C. Circuit law. As the Eleventh Circuit has held that it is appropriate for the transferee court to apply its own interpretation of federal law, see Murphy v. F.D.I.C., 208 F.3d 959, 964 (11th Cir. 2000), the court cannot conclude that unfair prejudice would result from the D.C. district court's proper application of the law of its circuit.

As a final matter, the court notes its view that refusing to transfer this case to the D.C. district court would constitute condoning conduct by plaintiffs that is tantamount to impermissible forum shopping. Such action by the court clearly would not be a proper exercise of its discretion.

2. The clerk shall transfer this case to the United States District Court for the District of Columbia.

DONE AND ORDERED this 17th day of August, 2006.

s/ _____

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

In re Gibson, *et.al.*,	)
	) No._____
Petitioners-Plaintiffs,	)
	)

DECLARATION OF ARTHUR A. SCHULCZ, SR.

Pursuant to 28 U.S.C. § 1746, I, Arthur A. Schulcz, Sr, declare as follows:

1. My name is Arthur A. Schulcz, Sr. I have personal knowledge of and am competent to testify to the matters addressed herein.

2. I am counsel of record for the chaplain plaintiffs in *Gibson v. U.S. Navy*, No. 3:06cv187, originally filed in the Northern District of Florida. I am also counsel of record for two chaplain cases in the District of Columbia, *Chaplaincy of Full Gospel Churches v. Winter* ("CFGC") (originally *v. Danzig*, the Secretary of Navy when the case was filed, then *England, Johnson, England* and now *Winter*), No. 99cv2945, and *Adair v. Winter* (originally *Danzig*, then *England, Johnson, England* and now *Winter*), No. 00cv566. *CFGC* and *Adair* have been consolidated for pretrial purposes, including discovery.

3. This Declaration is submitted to explain the sequence of events following the Eleventh Circuit's denial of the *Gibson* Petitioners' Petition for Mandamus and establish there is no other avenue open to Petitioners for review of the District Court's transfer motion and the Eleventh Circuit's denial of Petitioners' mandamus petition except through a petition to this Court for mandamus.

4. Following receipt of the Eleventh Circuit's Order

denying *In re Gibson's* Petition for Mandamus, I contacted the Eleventh Circuit Clerk handling the case to determine if a mandate would issue under Fed. R. App. P. 41 or if Petitioners could obtain a stay of the Order allowing Petitioners to seek review by the Supreme Court before the case's record was transferred to the District of Columbia. The Clerk told me once the order denying the writ had issued, the Eleventh Circuit had no jurisdiction and no further order would issue from the Circuit.

5. Attempting to stay transfer of the record until Petitioners could seek Supreme Court review of the District Court's Order and the Eleventh Circuit's denial of mandamus, I called opposing counsel, left a message for him on his voice mail, asking if the Defendants/Respondents would oppose a motion for a stay.

6. I then contacted the District Court Judge's chambers to inform the Judge I was seeking a stay but did not yet have a response from opposing counsel.

7. The District Court then informed me that the District Court Judge would not issue a stay and would sign a transfer order as soon as it was prepared, which she did on September 20, 2006, transferring the Case file to the District of Columbia.

8. The case was docketed in the District of Columbia on September 29, 2006 and is now assigned to the *Adair* District Court Judge, the Hon. Ricardo Urbina.

9. The parties moved in the D.C. District Court for a stay pending this Court's review of this Petition and on November 7, 2006 the District Court entered an order granting the parties' motion to stay the action until the resolution of the Plaintiffs' petition to the Supreme Court seeking review of order granting the motion to transfer. In moving for the stay,

Respondents stated they would move to consolidate the case with *Adair* if the Court denies this Petition.

This testimony is true to the best of my knowledge and ability, it is made under penalty of perjury and reflects the testimony I would give if called to testify in a court of law.

November 13, 2006

Arthur A. Schulcz, Sr.
Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In re Gibson, et.al.,	)	
	)	NO. 06-_____
Petitioners-Plaintiffs,	)	
	)	

DECLARATION OF ARTHUR A. SCHULCZ, SR.

Pursuant to 28 U.S.C. § 1746, I, Arthur A. Schulcz, Sr, declare as follows:

1. My name is Arthur A. Schulcz, Sr. I have personal knowledge of and am competent to testify to the matters addressed herein.

2. I am counsel of record for the plaintiffs in *Gibson v. U.S. Navy*. I am also counsel of record for two chaplain cases in the District of Columbia, *Chaplaincy of Full Gospel Churches v. Winters* (originally v. Danzig, then England) and *Adair v. Winters* (originally Danzig, then England). These cases have been consolidated for pretrial purposes, including discovery.

3. After *Adair* was filed, which originally sought class action status, numerous chaplains contacted me about joining the litigation. At that time, there were few decisions in the cases.

4. On behalf 25 of these chaplains and the *Adair* plaintiffs, in June 2002 I moved add 25 new plaintiffs to *Adair*, a procedure the District Court approved in a 2/7/02 status conference. This followed completion of briefing on summary judgment and class certification issues, according to the schedule approved by the Court.

5. In arguing for their addition, they and the *Adair* plaintiffs discussed the necessity for an adequate pool of plaintiffs to represent and support a class action.

6. The District Court took no action on the motion to add for almost a year and then dismissed it without prejudice or explanation.

7. In 2003 the District Court granted Plaintiffs' motion to compel the Secretary of Navy to release board personnel from their oath of secrecy so plaintiffs could establish evidence that denominational bias had occurred on the boards, that some selections for promotion were based on denomination rather than the record, and the faith group identifier which had been provided to board members was used as a consideration in determining selections. *Chaplaincy of Full gospel Churches v. Johnson,* 217 F.R. D. 250, 260-61 (D.D.C. 2003). The District Court found evidence of board proceedings was relevant and material because only board members could testify to what happened during board proceedings. *Id.* at 256.

8. Defendants appealed this decision and the U.S. Court of Appeals for the District of Columbia reversed it in *In re England,* 375 F.3d 1969 (D.D.C. 2004), *cert denied,* 543 U.S. 152 (2005). *In re England* held § 618(f) was an absolute bar to disclosure of board proceedings. The Court of Appeals ignored plaintiffs' evidence that indicated denominational bias on specific boards, as well as DOD IG and NIG investigations which established some promotion selections had been based on or influenced by denomination.

9. No other court of appeals has ruled the government may hide unconstitutional misconduct from civil discovery. In the 11th Circuit, *In re Nelson,* 873 F.2d 1396, 1397 (11th Cir. 1989), holds the opposite, that a statute must have specific language indicating Congress specifically intended to bar civil

discovery. The Ninth Circuit in *Zambrano v. INS*, 972 F.2d, 1122, 1125 (9th Cir. 1992), also has rejected the logic of *In re England*. *Wilkins v. United States*, the Southern District of California rejected the Navy's efforts to bar discovery of both promotion boards and selective early retirement (SER) boards. *See United States v. U.S. District Court for the So. Dist. of Cal.*, 384 F.3d 202 (9th Cir. 2004).

10. Although *In re England* commented that it did not bar plaintiffs' other claims, the practical effect of *In re England* is to bar the *Adair* plaintiffs' First and Fifth Amendment claims of discrimination in the board proceedings and their RFRA claims because without discovery or promotion board proceedings there can be no evidence that denomination, in fact, played a part.

11. In addition to the 25 chaplains who requested to be added to *Adair* and were denied, other chaplains contacted me about becoming involved in chaplain litigation, specifically attacking the injustices of the promotion system and the ability of senior chaplains to ruin careers without accountability.

12. The Associated Gospel Churches (AGC) discussed with me sometime around 2004 the possibility of joining the chaplain litigation or filing a new case on behalf of its chaplains because the Navy's discriminatory policies had ruined careers of several outstanding AGC chaplains.

13. I am authorized by the AGC to say that my initial counsel to AGC was that it would be foolish to file suit in the District of Columbia and it would be foolish and unethical for me to file it there. I based this counsel on the fact that after *In re England* and the District Court's refusal to certify for interlocutory appeal the question whether chaplains serving as promotion board members served as naval officers or

denominational representatives, it would be almost impossible to prevail on issues concerning misconduct or denominational bias in selection board proceedings.

14. I informed AGC and others that while the above issues may eventually be resolved on appeal, that process takes years, carries no guarantees, and the expenses would be unnecessary, given the availability of other venues in which the issues could be raised where strict scrutiny and discovery of board proceedings would apply.

15. Because the *Adair* District Court failed to certify a class 3 years after approving a motion to certify (because there was no definition and no appointment of class counsel) and chaplains continued to ask about becoming involved, it became apparent I needed to protect and pursue their interests in an alternative forum, particularly given the fact the *Adair* Court would not apply strict scrutiny to obvious denominational preferences and there were many legal uncertainties, including the scope of discovery.

16. Every plaintiff in *Gibson v. U.S. Navy* was informed of the impossibility of successfully pursuing their claims in the District of Columbia. These plaintiffs want to challenge the constitutionality of Respondents' / Defendants' selection board procedures, specifically including a 26 year practice reserving promotion board memberships solely for Roman Catholic chaplains, a challenge the *Adair* Court rejected.

17. Many of these plaintiffs understand strict scrutiny is supposed to apply to obvious denominational preferences and they would not bring suit in a jurisdiction which ignored Supreme Court precedent holding that strict scrutiny applied to denominational preferences.

18. Under the Rules of Professional Conduct of the District

of Columbia, I have an obligation as both an advisor and as a litigator to advise my clients about the validity of their claims and the difficulty in bringing those claims under Local Precedent if such exists.

19. My obligation as an attorney is that if there is a valid claim, and these claims are valid and supported by existing law and fact, to find a venue where their constitutional right to petition for redress may be exercised.

20. I would violate the Rules of Professional Comduct of the District of Columbia as well as Rule 11 were I to bring the claims of *Gibson* in the District of Columbia, knowing that:

(a) the case would be assigned to the *Adair* judge under the District's "related case" rule;

(b) the judge has denied strict scrutiny to denominational preferences and promotion board composition issues;

(c) *In re England* effectively bars discovery necessary to prove their First and Fifth Amendment claims, discovery which is available in other circuits; and

(d) Religious Freedom Restoration Act and other claims face an uphill battle because of decisions in the District of Columbia which differ from decisions in this and other circuits.

21. It is my understanding that these same obligations apply in almost every other jurisdiction, including the Northern District of Florida.

22. Further, as attorney for a prospective class, I have an obligation to represent and advance the interests of the class. Bringing an action in the District of Columbia would not be in

the class's interest given the state of the District's law and the great difficultly and/or impossibility of vindicating claims there, claims that are valid in other circuits.

23. In summary, no Petitioner directed this attorney to file their claim in the District of Columbia I know of no Petitioner who would direct this attorney to file his claim in the District of Columbia when he/she had other venues available and I would not bring a case where I know the major claims will be dismissed or are impossible to prove because discovery has been barred.

24. No *Gibson* plaintiff resides in the District of Columbia

This testimony is true to the best of my knowledge and ability, it is made under penalty of perjury and reflects the testimony I would give if called to testify in a court of law.

August 31, 2006

_____

Arthur A. Schulcz, Sr.
Counsel for Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES,	)	
v.	)Case Number 1: 99CV002945)(RMU)	
THE HON. GORDON R. ENGLAND, et al.	)	**Consolidated with**
ROBERT H. ADAIR, et al.,	)	
v.	)Case Number 1: 00CV00566)(RMU)	
THE HON. GORDON R. ENGLAND, et al.	)	

DECLARATION OF KLON K. KITCHEN JR.

Pursuant to 28 U.S.C. § 1746, I, KLON K. KITCHEN JR. declare as follows:

1. I live at 107 Falcon Dr., Richmond Hill, GA 31324. Iam competent to testify on and have personal knowledge of the matters addressed or discussed in this Declaration.

2. I am an Army chaplain at the grade of Captain, currently assigned to Fort Stewart, GA. I have recently been selected for promotion to the rank of Major (O-4).

3. Prior to becoming an Army chaplain, I was a Navy chaplain until I was separated after being twice not selected for promotion to Lieutenant Commander (LCDR). I am a plaintiff in the Chaplaincy of Full Gospel Churches lawsuit

and this declaration addresses an incident that occurred during my time as a Navy chaplain.

4. Around May of 1996, I was assigned to Marine Air Group (MAG) 31 at Beaufort, S.C.

5. I was present at a luncheon with Chaplain (Captain) Wayne Bumbry from the 2D Marine Air Wing and Chaplain (Commander) Norman Brown, the MAG 31 senior chaplain, and Chaplain (LCDR) Dave Gibson, also of MAG 31.

6. During this luncheon, Chaplain Bumbry said that he had recently sat on a Chaplain Captain selection board and that at the end of the board they realized that they had not selected any Catholics for Captain. He told us that the board members had to reconvene in order to pick a Catholic and deselected a Protestant to do so, i.e., took someone off the list that had already been selected.

7. I remember this distinctly because having been twice passed over (not selected) to Lieutenant Commander I was on my way out of the Navy, this was my last month on active duty, and I was upset that a promotion board would deselect someone merely to make sure they had a Catholic selectee.

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents the testimony I would give if called upon to testify in a court of law.

Dated: January 16, 2002 /S/ Klon K. Kitchen, Jr.
KLON K. KITCHEN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES	)
Plaintiff	)
V.	)
THE HONORABLE RICHARD J. DANZIG,. et al.,	)Civil Action NO. 1:99CV02945

Affidavit of Floyd Cedric Ellison

1. May name is Floyd Cedric Ellison. I was born March 28, 1937 and reside at 535 "J." Street, Chula Vista, California, 91910. I have personal knowledge of and am competent to testify concerning the information presented in this affidavit.

2. I completed my undergraduate education at Augustana College in Rock Island, Illinois in June, 1959. My Master of Divinity in May of 1963, the Master of Religious Education, June 1971, and the Doctor of Ministry in June of 1981were degrees each completed with the American Baptist seminary of the West located in Berkeley California.

3. After I was endorsed by the American Baptist Churches, I was commissioned as a chaplain on March 22, 1972, and entered active duty in the Navy on February 1, 1974.

4. I was selected for early retirement by the Selective Early Retirement Board (SERB) for FY 1997, and I was separated (retired) from the Navy on August 1, 1997.

5. During June of 1996 I turned over the position of Command (Senior) Chaplain, Naval Construction Battalion Center, Port Hueneme, California to the new incoming Command Chaplain, Captain Jim Anderson. Captain Anderson had just that previous February 1996, set on the Chaplain Corps Captain selection board as one of its five Board members. He was the only Catholic chaplain on the board. Traditionally there was always a minimum of one priest on each board.

6. During Chaplain Anderson's and my turnover process, Chaplain Anderson described an event which he said occurred during the FY 97 Captain Selection Board proceedings conducted earlier that February of 1996. He said that after the initial votes were cast, not one Catholic chaplain had been selected for Captain. He mentioned his concern to the board, and a woman officer on the board told him, "Well I am Catholic, and I know several of these Catholic chaplains; they're certainly not Captain material!" According to Chaplain Anderson, the following day, he again brought up the issue, and said that there would be a hue-and-cry from the Catholic Military Archdiocese, and they would never hear the end of it, if at least on Catholic or not selected. Chaplain Anderson, a Columban Order priest, then brought out the record of fellow Franciscan Order priest, Lewis Iasiello, whom the board then voted on, and in fact selected two years junior to the other selectees. Chaplain Anderson did not mention any other faith groups threatening retribution if there candidates were not selected during the board's proceedings.

7. I turned over the position to Chaplain Anderson, and reported to Guam where the following year I was selected for early retirement, effective August 1, 1997.

Under penalty of perjury, I affirm that the above information is true and correct to the best of my ability and reflects the testimony I would give if called to testify in a court of law.

/S/ Floyd Cedric Ellison
Floyd Cedric Ellison

Captain, Chaplain Corps

U. S. Navy (retired)

Subscribed and sworn to before me this 31st day of January, 2000.

/S/ Haydee La Bounty
HAYDEE LA BOUNTY
Notary Public
NOTARY SEAL
My Commission expires: 11-2-2003

Pursuant to 28 U.S.C. § 1746, I, Gary Paul Stewart, declare as follows:

1. I live at 10803 Tides Court, Fredericksburg, Virginia. I am a chaplain at the grade of Lieutenant Commander currently assigned to Marine Corps Base Quantico, VA. I am competent to testify on and have personal knowledge of the matters addressed or discussed in this declaration.

2. I was a recorder on the Fiscal Year 91 Chaplain Staff Corps Lieutenant Commander Promotion Board (the "Board").

3. As a recorder, I was responsible for making sure all the chaplain records appearing before the Board were complete and in order. This can only be accomplished by reviewing the records to make sure that all the appropriate information is current and complete, e.g., photos, awards, and reports, and no improper material is in a chaplain's file.

4. In doing this, I reviewed all the records of those appearing before the Board. I was in a position to have seen the quality of the fitness reports and records of those considered by the Board, both those selected and not selected.

5. I can state without equivocation, and without revealing the "proceedings" of the Board, that the record of one Catholic selected for promotion to Lieutenant Commander was grossly inferior to other chaplains who were passed over for promotion, including at least one non-liturgical chaplain who is a named plaintiff. In addition, the the chaplain selected with the far inferior record was grossly overweight, a fact well known throughout the Chaplain Corps.

6. It was made known to me after the Board concluded that this chaplain had been charged with multiple counts of pedophilia while previously stationed in Sigonella, Italy, a fact

that was not recorded in his records at the time the Board considered and promoted him to the rank of Lieutenant Commander.

7. I witnessed the discussion about and selection of this chaplain.

8. I am requesting that the Court, as a higher authority, direct the Secretary of the Navy to relieve me of my oath so that I can testify publicly to what I witnessed and heard. I believe it is highly relevant to the issue of misconduct on promotion boards and unconstitutional preferences within the United States Navy and the evidence I will reveal is not available from other, non restricted sources.

9. I am in no way being compelled to testify on this matter, but desire to testify of my own accord, to preserve a clear conscience, and to protect the Navy and those that serve it from discrimination and prejudice.

***

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents a portion of the testimony I would give if called upon to testify in a court of law. It is here limited due to the oath of secrecy enforced upon me by the Secretary of the Navy.

Dated: 13 August 2004 /S/ Gary P. Stewart
GARY PAUL STEWART

VIABILITY OF CLAIMS BY CIRCUIT COURT VENUE

CLAIM	ELEVENTH CIRCUIT	DISTRICT OF COLUMBIA
10 U.S.C. § 612 unconstitutional as applied to CHC boards	Valid	Barred
26 year Denominational Preference is Establishment Clause Violation **Strict Scrutiny Applies	Valid ** Yes	Barred ** No
Chaplains Rating Chaplains Violates 1st & 5th Amendments	Valid	Barred
Discovery into Promotion Boards	Valid under *In re Nelson*	Barred by *In re England*
Discovery into SER Boards	Valid under *In re Nelson*	Yes but questioned

Use of denominational criteria by promotion boards unconstitutional	Valid under *In re Nelson*	Barred by *In re England*
Defendants' Identification of Candidate's Faith Group Violates 1st & 5th Amendments	Valid	Barred
Chief or Deputy as Board President unconstitutional	Valid	Barred
CHC practices violate RFRA	Valid	Barred

GLOSSARY AND DEFINITIONS

GLOSSARY

The following abbreviations are used throughout this Brief:

Captain - CAPT
Commander - CDR
Lieutenant Commander - LCDR
Rear Admiral - RADM

Department of Defense - DOD
DOD Inspector General - DODIG
Naval Inspector General - NIG
Fiscal Year - FY

DEFINITIONS RELATED TO THIS APPEAL

A. **Failure to Select (FOS)** - a military term of art meaning that the person was considered by a promotion board but not selected; also known as a "Pass over".

B. **Faith Group.** Not all religious churches or organizations believe in or consider themselves "denominations". To accommodate this belief and allow the many small non-denominational religious bodies or churches to have chaplains to minister to their military members, the DOD has historically allowed religious groups whose beliefs are similar to associate into "faith

groups" for purposes of endorsing chaplains. DOD now uses the term "Religious Organization" to describe religious bodies who "chose to participate in the Military chaplaincies" and endorse chaplains as the organization's representiaves to the Armed Forces. *See* DOD Instruction 1304.28 and Enclosure 2 ("Definitions"). The term "faith group" includes "denomination" and is used to signify both denominations and other distinct religious bodies and organizations.

C. **Faith Group Categories**. The Navy divides its chaplains and personnel into four general religious categories, allegedly according to faith group similarities: Catholic, Protestant liturgical, non-liturgical Protestant and Special Worship.[4] This categorization is in A Chief of

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[4] The "Special Worship" category includes a group of faith groups, both Christian and non-Christian, whose ministry needs are distinctly different from the majority of Christian faith groups: Jewish, Christian Science, Seventh Day Adventist, Latter Day Saints (Mormons), Buddhist, Hindu, Móslem and Unitarian are in this category.

Chaplains' 7/31/87 Memorandum for the Asst. Secy. of the Navy, Subj: "Chaplain Corps Faith Group Imbalance", explained Chaplain Corps uses faith group clusters to manage itself. The second and third terms are significant to this petition and its issues.

1. "Protestant liturgical" collectively describes those Christian denominations which trace their origins to the Protestant Reformation, *e.g.*, Lutheran and Reformed, "emphasize a sacramental theology including infant baptism, worship under officially adopted forms, wear vestments and follow a cycle of lectionary[5] readings." *Id.* at 2. "Protestant liturgical" means chaplains of the various Lutheran, Reformed, Episcopal, Methodist, Methodist Episcopal, Presbyterian, Congregational and Orthodox faith groups.

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[5] A sequence or list of scripture readings to be read in church services at specific times throughout the year. Webster's New World Dictionary, p. 834 (1962).

2. "Non-liturgical Christian" ("Non-liturgical") refers to those Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they emphasize preaching from the Bible, baptize only adults or children who have reached the age of reason, and their clergy "do not wear vestments and do not follow a cycle of lectionary readings" during services. *Id.* Some Navy chaplains refer to these faith groups as "evangelicals". Baptist, Evangelical, Pentecostal, Bible and Charismatic Churches, and Christian Churches and Disciples of Christ are examples of non-liturgical Christian faith groups.

3. "Liturgical tradition" refers to both Catholic and Protestant Liturgical faith groups.

D. **Selection Board** - a board convened under 10 U.S.C. § 612 (or other statutes) to select officers for promotion or selective early retirement (SER).

E. **Selective Early Retirement** - the selection for involuntary retirement of officers who have reached the necessary time in service to qualify for military retirement; i.e., a forced retirement.